

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SHEILA MARIE LIVELY,

Defendant-Appellee.

UNPUBLISHED

November 21, 2006

No. 264222

Wayne Circuit Court

LC No. 04-011339-02

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ERIC EUGENE LIVELY,

Defendant-Appellee.

No. 264223

Wayne Circuit Court

LC No. 04-011339-01

Before: Whitbeck, C.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendants, husband and wife, were charged with various crimes¹ following the search of their residence and automobile pursuant to a warrant. The circuit court granted defendants' motions to suppress evidence, finding that the affidavit in support of the warrant was insufficient to establish probable cause, and dismissed the charges. The prosecutor appeals as of right. We

¹ Defendant Eric Lively was charged with delivery or manufacture of ecstasy, MCL 333.7401(2)(b)(i); possession of a firearm by a felon, MCL 750.224f; possession of marijuana, MCL 333.7403(2)(d); and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant Sheila Lively was charged with possession of ecstasy, MCL 333.7403(2)(b)(i); possession of marijuana; and felony-firearm.

reverse and remand. These appeals are being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

A magistrate issued a warrant permitting a search of 608 Poplar Street in Wyandotte. In the affidavit in support of the warrant, Wyandotte Police Detective Scott Galeski stated that police had responded to an unnamed “victim” who was running and yelling through the city streets, complaining that people with guns were following him and that he had been sexually assaulted. After the victim was hospitalized, he was again interviewed and, at that time, he told Galeski that none of those events had taken place; that he had been using alcohol, marijuana, and ecstasy at the time; that he had purchased the illegal narcotics from a Roosevelt High School student by the name of Harold Hammond, whose nickname was “Tuffy”; and that the transactions had taken place out of Hammond’s residence at 608 Poplar Street. The affidavit further stated that Galeski had verified Hammond’s identity and address through an in-house computer check and through Roosevelt High School officials. Furthermore, the affidavit alleged that trash bags removed from the curb outside the Poplar Street address contained marijuana stems, seeds, and packaging, as well as evidence of residency.

A search of the Poplar Street residence resulted in the seizure of 127 ecstasy tablets and nine individually-wrapped baggies of marijuana, an unloaded semi-automatic pistol and ammunition, currency, and rave equipment from defendants’ upstairs bedroom. In a basement room belonging to Hammond (defendant Sheila Lively’s son), marijuana and a price sheet for drug sales were found. Officers also found a bag containing marijuana residue, a gas mask, rave equipment, narcotics packaging that matched the packaging located in the upstairs bedroom, a black light, and a “bong” in Sheila Lively’s car. Defendants subsequently provided written statements to police.

II. STANDARD OF REVIEW

“A magistrate’s ‘determination of probable cause should be paid great deference by reviewing courts.’” *People v Whitfield*, 461 Mich 441, 446; 607 NW2d 61 (2000) (citation omitted). “[T]his Court must evaluate the search warrant and underlying affidavit in a commonsense and realistic manner.” *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999), citing *People v Poole*, 218 Mich App 702, 706; 555 NW2d 485 (1996). Considering only the totality of the actual facts and circumstances presented to the magistrate, this Court must determine whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause. *Echavarria*, *supra* at 366-376.

III. ANALYSIS

A search executed pursuant to a warrant is valid if the warrant is based on probable cause. US Const, Am IV; Const 1963, art 1, § 11; MCL 780.651(1); *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004). “Probable cause to issue a search warrant exists where there is a ‘substantial basis’ for inferring a ‘fair probability’ that contraband or evidence of a crime will be found in a particular place.” *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000) (citation omitted). The magistrate’s finding of reasonable or probable cause

must be based on all of the facts related within the affidavit. MCL 780.653; *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001).

The search warrant affidavit in this case was based, in part, on information received from an unnamed “victim.” An affidavit may be based upon information supplied by an unnamed person. *People v Keller*, 270 Mich App 446, 448; 716 NW2d 311 (2006). “Such information is deemed sufficient if the magistrate can ‘conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.’” *Id.* at 448-449, quoting MCL 780.653(b). A finding of personal knowledge should be derived from the information provided and not merely from a recitation that the informant had personal knowledge. *People v Stumpf*, 196 Mich App 218, 223; 492 NW2d 795 (1992). However, “[i]f personal knowledge can be inferred from the stated facts, that is sufficient to find that the informant spoke with personal knowledge.” *Id.*

The circuit court concluded that the informant was an unreliable source because “he retracted everything that he had given to the police, saying that it was not true and that . . . he was under the influence of drugs or something at the time that he gave it.” That is a factually inaccurate recitation of the contents of the affidavit. According to the affidavit, although the informant originally came to the attention of the police when he was under the influence of drugs and alcohol, the affiant “later” interviewed the informant, who then explained that he had obtained the illegal narcotics from Hammond at his Poplar Street address.

Moreover, a reasonably cautious person could have determined that the information supplied by the informant stemmed from personal knowledge and was reliable. The informant gave the affiant specific information about his own purchase of narcotics from Hammond. The informant further advised the affiant that Hammond’s nickname was “Tuffy” and that he was a student at Roosevelt High School. The affiant verified the information provided by the informant, checking both with the Wyandotte Police computer system and with school officials to confirm Hammond’s identity and address. There is no reasonable basis for concluding that the information supplied by the informant, which was verified for accuracy, was unreliable.

The affidavit was also based on the affiant’s discovery of marijuana and packaging, as well as evidence of residency, in defendants’ trash. The results of the affiant’s field test on the suspected narcotics were positive. An independent police investigation that verifies information provided by an informant can support issuance of a search warrant. *Stumpf, supra* at 223; *People v Harris*, 191 Mich App 422, 425-426; 479 NW2d 6 (1991). The mere possibility of another explanation for the presence of contraband does not negate a finding of probable cause, *People v Russo*, 439 Mich 584, 613; 487 NW2d 698 (1992), and investigators are not required to eliminate all other possible sources of contraband before seeking a warrant, *People v Kort*, 162 Mich App 680, 688; 413 NW2d 83 (1987).

There is no support for the circuit court’s determination that some independent “corroboration” of the marijuana discovered in defendants’ trash was required. See *People v Pinnix*, 174 Mich App 445, 446; 436 NW2d 692 (1989) (holding that a finding of probable cause may be based on the fruits of a warrantless search of household garbage set out for collection). The mere *odor* of marijuana, if detected by a qualified individual and testified to before a magistrate, may support a finding of probable cause. *Johnson v United States*, 333 US 10, 13; 68

S Ct 367; 92 L Ed 436 (1948), citing *Taylor v United States*, 286 US 1; 52 S Ct 466; 76 L Ed 951 (1932). Accordingly, where actual physical evidence of marijuana was found in the trash, and where the evidence of residency provided a nexus between the trash and defendants' house, the magistrate properly determined that a fair probability existed that contraband would be found in defendants' residence. See *People v Thivierge*, 174 Mich App 258, 260; 435 NW2d 446 (1988). Moreover, the trash pull evidence was indeed corroborated by the information supplied to the affiant by the informant. In short, the totality of the affirmative allegations set forth in the affidavit fully supported the issuance of the search warrant.²

Reversed and remanded for reinstatement of the charges against defendants and for further proceedings on those charges. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Bill Schuette

² We note that even if the search warrant affidavit was defective, suppression of the evidence and dismissal of the prosecution were not appropriate. When the police act in reasonable and good-faith reliance on a search warrant, the items seized need not be suppressed if the warrant is later declared invalid. *People v Goldston*, 470 Mich 523, 526; 682 NW2d 479 (2004).